No. 11555

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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PAUL J. ZIEGLER,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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## APPELLEE'S BRIEF.

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## JURISDICTIONAL STATEMENT.

Appellant was indicted under the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. Sec. 633, *et seq.*) the Second War Powers Act of 1942; General Ration Order No. 8 and the Third Revised Ration Order No. 3. The District Court had jurisdiction under the Second War Powers Act of 1942, Sec. 301. The offenses charged were committed in the Southern District of California [R. 2-8]. Judgment was entered on February 11, 1947 [R. 41, 641]. Notice of appeal was filed on February 25, 1947 [R. 46-7] This Court has jurisdiction under Section 128 of the Judicial Code as amended (28 U. S. C. A. Sec. 225).

## STATUTES AND REGULATIONS INVOLVED.

The Statutes and Regulations involved in this case are set forth in the Appendix to appellant's opening brief.

## STATEMENT OF THE CASE.

On December 31, 1946, an eight count Information was filed in the United States District Court for the Southern District of California, Central Division, against appellant and the West Coast Supply Company [R. 2-8].[1] Counts One, Three, Five and Seven each charged that appellant and the West Coast Supply Company wilfully and unlawfully issued and caused to be issued a sugar ration check upon a ration account in the Union Bank and Trust Company for an amount larger than the balance in the account on which it was drawn [R. 2, 4, 5 and 7]. Counts Two, Four, Six and Eight each charged that appellant and the West Coast Supply Company wilfully and unlawfully received a certain designated quantity of sugar, a rationed commodity, in exchange for a sugar ration check issued by the defendants when they knew and had reason to believe that the ration document was not validly issued because the sugar ration bank account did not have a sufficient balance to cover the check at the time that it was issued [R. 3, 4, 6, 8].

The sugar referred to in the even numbered counts was that obtained by virtue of the issuance of the checks

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[1]The references preceded by "R" are to the Record on Appeal and those preceded by "A. B." are to appellant's brief.

alleged to have been illegally issued in the odd numbered counts.

On January 20, 1947, motions of defendants to dismiss the Information were denied [R. 9], and each of the defendants entered pleas of not guilty to each of the eight counts of the Information [R. 10]. On February 4, 1947, a motion by the Government to amend each count of the Information in certain particulars, was granted by the District Court [R. 10, 11. See also R. 3, 8].

From February 4 to February 11, 1947, appellant and defendant West Coast Supply Company were tried before the Honorable J. F. T. O'Connor, and a jury [R. 11]. At the conclusion of both the Government's and the defendants' cases, the trial Judge granted a motion for a directed verdict of acquittal as to the defendant West Coast Supply Company on all counts of the Information [R. 12], and denied a similar motion as to the defendant Paul J. Ziegler, appellant here [R. 12].

The jury then found appellant guilty on each of the eight counts of the Information [R. 41].

Thereafter the Court sentenced appellant to imprisonment for three months on each of the eight counts of the Information, the sentences to run concurrently on all counts, fined him $2,500 on each count [R. 43-45], and then suspended the jail sentence and placed appellant on probation for sixty days on each count, to run concurrently [R. 44-45].

## STATEMENT OF FACTS.

### Preliminary.

The "Summary of Facts" set forth in appellant's brief (A. B. 4-6), as well as other reference in that brief to evidence taken at the trial, does not set forth the evidence most favorable to the Government, which alone will be considered on appeal.[2]

Appellant, an attorney in this State, a former O. P. A. ration board member, is disclosed by the evidence to have engaged in one of the grossest and most brazen violations of Federal laws to have come to the attention of the authorities in this District. Utilizing a preconceived scheme and carefully and deliberately prepared plan for obtaining sugar during a period when it was rationed by law to provide its most effective utilization in a war period, appellant lied and falsified documents and caused others, at times unknowingly, to take steps which would effectuate appellant's illegal purposes.

As a result of his machinations, an authorized sugar ration balance of less than 40,000 pounds was deliberately misused by appellant in such a way as to permit him to obtain illegally for himself, and others associated with him in business ventures utilizing sugar, a total of more than 1,300,000 pounds of sugar [R. 79-80].

In the circumstances disclosed by this record, the sentence meted out to appellant was relatively mild, and neither it, nor his conviction should in any way be disturbed.

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[2]See *Hemphill v. United States,* 120 F. (2d) 115, 117 (C. C. A. 9), cert. den. 314 U. S. 627.

## The Facts Most Favorable to the Government.

In the main, the facts most favorable to the Government were not contradicted by appellant, his primary defense consisting of an attempt to avoid responsibility by highly technical defenses and unacceptable explanations of his acts. In brief, the facts are these:

Appellant is an attorney [R. 333-334], and was once a member of an O. P. A. ration board [R. 122]. For some years past, appellant has been more interested in sugar and sugar products than in the practice of law [R. 333-334]. In that connection, appellant with his father, John H. Ziegler, since February 1, 1944, constituted the co-partnership known as John H. Ziegler Company [R. 333], while appellant's father and brothers, and possibly also appellant [R. 145, 147], were, since at least February, 1943, partners operating under the name of West Coast Supply Company [R. 333. See also R. 181].

The John H. Ziegler Company purportedly manufactured jellies, flavors, extracts, and other items utilizing sugar as a major ingredient [R. 333], which functions prior to February 1, 1944, were a part of the operations of the West Coast Supply Company [R. 335]. The John Ziegler Company then purportedly sold the manufactured products to the West Coast Supply Company which resold them to the wholesaler [R. 344-345]. Sugar requirements for these operations were about 47,500 pounds a day [R. 336]. Both businesses operated upon the same continuous physical premises [R. 337], and appellant did work for both concerns [R. 286, 360-363]. It is not clear where the activities of each of these concerns ended and the other began with reference to the business of preparing and of selling jams, jellies and allied products.

Appellant's primary function on behalf of both these companies was to devote himself to governmental regulations and laws affecting the business in which they were engaged [R. 335, 361. See also R. 73-74].

West Coast Supply Company had an official sugar quota and also a sugar ration account since March 17, 1943, at the Union Bank and Trust Company, and appellant's signature was one of the authorized signatures against that account [Gov. Ex. 2]. The John H. Ziegler Company had no sugar quota [R. 336, 362]. However, appellant bought sugar for the latter (and appellant's counsel intimated at the trial that questions as to these facts might expose other offenses and compel appellant to testify against himself) [R. 361-363. See also R. 373-382].

In June, 1946, appellant says, he followed closely the Congressional progress of the bills to extend the Emergency Price Control Act [R. 345-349], and consulted sugar brokers as to sugar supplies in the event rationing ended [R. 155-156, 345-349].

Prior to July 1, 1946, appellant admittedly had sought to obtain increased sugar quotas from the Office of Price Administration, and in order to succeed in these endeavors, he had deliberately described himself on legal forms which indicated on their face that falsification of any fact was a federal offense, which he filed with that agency, as a "partner" of the West Coast Supply Company, whereas in truth, according to appellant's admission on the stand he was not then such a partner [R. 244-245, 372-378, 401-409]. Appellant's explanation of this action can best be appreciated only by a direct reading of the record by this Court [R. 403-409].

In February, 1946, appellant told officials of the Office of Price Administration [R. 293] that he "felt that sugar rationing was going off" and that he was "going to get sugar one way or the other", that he was "short of sugar". Appellant further stated that "inasmuch as the meat rationing and gasoline, processed foods had gone off and no accounting was ever made of the filling station people or the grocers or the butchers as to how many points they had left or if it equaled their inventory," he felt that the same would happen to sugar. And he was going to get it one way or the other *(ibid.)*.

On July 1, 1946, appellant purchased about 1,300,000 lbs. of sugar by telephone from various concerns [R. 126, 349, 391]. For this sugar he issued the four sugar ration checks involved in this case [R. 66-70, 349-351]. The sugar was billed, sent to, and accepted by the West Coast Supply Company [R. 133-135, 148-149, 159-162, 391].

The only sugar ration account on which appellant could draw was that of the West Coast Supply Company [R. 367].

The sugar was paid for in money by four checks drawn on the John H. Ziegler Company and signed by appellant [R. 355, 385-390]. Three of these checks indicate on their face that they were "In payment of . . . West Coast Supply Company" [R. 379, 381, 387, 393].

As to the four ration checks, appellant admitted at the trial that he signed all four of these checks [R. 340-343, 344, 370-373, 82], but denied that any of them bore the words "West Coast Supply Company" above his signature at the time he issued them [R. 340-343, 344, 370-373].

More fully, what occurred on July 1, 1946 was this:

When appellant sought to place an order for 600,000 lbs. of sugar with Mailliard & Schmiddel through its official Leland at about 10 A. M. on July 1, Leland read to appellant a telegram which he had received, to the effect in part that sugar rationing was being continued in full force and effect [R. 125-129], and informed appellant that a ration check for the 600,000 lbs. would be required of him [R. 130]. Appellant replied that "the O. P. A." was out of existence [R. 157], but he nevertheless agreed to furnish the check [R. 130, 157-158], and did so that afternoon [R. 130-132, 158]. This check bore appellant's signature, but not the name of the West Coast Supply Company [R. 132, 149]. The latter was later inserted. The 600,000 lbs. of sugar was delivered to the West Coast Supply Company upon orders of appellant, and was accepted by it [R. 133-135, 148-149].

That day appellant also ordered, by telephone, an additional 660,000 lbs. of sugar from Parrott & Company, through its official Barry [R. 165-166], and next day that concern received a ration check for that number of pounds signed by appellant but not bearing the words "West Coast Supply Company" [R. 167-169]. A telephone call was then made to appellant, and he authorized the addition of those words to the check [R. 172-173, 183].

The sugar was shipped to the West Coast Supply Company and accepted by it [R. 185-187].

On July 1, appellant ordered an additional 80,000 pounds of sugar, over the telephone, on behalf of West

Coast Supply Company, from the Sims-Thompson Company [R. 192-193]. In placing the order appellant gave No. 148 as the number of a ration check covering the purchase, which check was actually issued by him for 80,000 lbs. and was subsequently received, complete in all details, by that concern [R. 194, 197-198, 207, 209, 215].

Finally, on July 1, appellant ordered a further 30,000 lbs. of sugar from the Kelley-Clarke Company through its employee Williams [R. 220-226] and, it received from him ration check No. 145 in that amount [R. 226, 232].

At the trial appellant admitted that, as to the 660,000 pounds check, Barry called him and stated that it did not carry "the name of the account on it." Appellant admits that he replied to Barry: "So what?"; that Barry said "Well, it should have an account name on it, shouldn't it?"; to which appellant says he replied "Not as far as I am concerned it shouldn't." To Barry's insistence that an "account" name be on the check, appellant, in part, admittedly answered "Well, that is up to you." [R. 341.]

Similarly, appellant admits that Williams telephoned to him respecting the omission of the words "West Coast Supply Co." from the 30,000 lb. check which he had sent the Spreckels Sugar Company [R. 341-342] and appellant admits that he replied "Well, what about it?" when this omission was brought to his attention and asserted that he rejected the demand that an "account name" appear on the check [R. 342-343].

Then, as to the 600,000 lb. check [R. 298], appellant claimed on the stand that in reply to Leland's telephone complaint that the check bore no account name, he, appellant, replied that he was aware of that fact, asked, "What of it?", rejected Leland's representations that the account name should appear on the check, and said also, in part, to Leland that he could put the account name on the check, that "I can't prevent you from putting it on there, but I don't think it's necessary. *You asked for a check. You got what you consider a check. What more do you want?*" [R. 342-343; italics ours].

The sugar brokers were "sufficiently well acquainted with me (appellant) to know from my voice who was talking" [R. 388]; in fact appellant was an old customer [R. 388-390].

On July 25 or 26, 1948, a Saturday, the bank official in charge of sugar ration accounts [R. 60-61] spoke to appellant advising him that the 600,000 lb. check had come in and that there were not enough pounds to the credit of the account to cover it. Appellant promised to contact the bank on Monday; he never made any deposits to cover the check [R. 75-77]. When the 660,000 lb. check came through to the bank, appellant told the bank official "Well, your instructions are to post it and show it as an overdraft and report it to the Office of Price Administration" [R. 77-78]. The final "overdraft" was of 1,351,804 lbs. [R. 120].

When a bank statement was later sent to the West Coast Supply Company showing these checks as charged against its account, it at no time objected [R. 100-101, 119].

## QUESTIONS PRESENTED.

Appellant has placed before this Court in his brief (A. B. 7-8), thirteen "Specifications of Error" which he uses as points on appeal, and as questions presented for determination by this Court.

To save the time of this Court, we shall discuss each of these thirteen points *seriatim.*

### I.

Appellant complains (A. B. 9-16) that the District Court committed reversible error by admitting in evidence the four ration checks which appellant issued in order to obtain the sugar, which was subsequently sent to him, each of which ration checks constitutes the basis for one of the odd numbered counts of the Information.

A reading of the so-called "Specification of Error I," which appellant uses as his argument, makes apparent that appellant seeks to transplant law relating to negotiable instruments into rules of evidence relating to criminal proceedings in the Federal District Courts by contending that a so-called "alteration" or "suspicion of alteration" (A. B. 10) of these checks precludes their admission in evidence as against appellant or his co-defendant. Plainly appellant's contention is without merit.

The ration checks were issued by appellant with the intent that they be accepted as valid ration currency by the sugar brokers from whom he ordered the sugar. Appellant's deliberate omission of the name of the West Coast Supply Company, even if his testimony to that effect were to be accepted at face value, in itself has probitive force with reference to the element of wilfulness. Manifestly the *modus operandi* of the appellant in his efforts to ob-

tain a rationed commodity to which he was not entitled, by utilization of the scheme which he concocted, constitutes evidence having probitive force as to the issues in this case.

For appellant to argue that his attempts to mislead the innocent vendors of the sugar should now constitute the cloak protecting him from prosecution indicates, we submit, that even after conviction appellant is still attempting to out-smart the Congress and the courts. That this Court obviously will not tolerate.

Even if the words "West Coast Supply Company" were not present upon the ration checks, it is clear from the entire record that appellant, being an authorized signatory for that company upon that ration account, and having no ration account in his own name, was deliberately misleading the brokers, with whom he had dealt on many occasions before on behalf of the West Coast Supply Company, into thinking that he was still functioning in that capacity. In fact, appellant was so functioning, and desired the brokers to so regard him, and deliberately intended that they should transfer to him the 1,300,000 pounds of sugar to which he knew he was not entitled.

Whether the actions of appellant with reference to these checks were in violation of the law, was a matter of proof for the Government. Such proof consisted of all the testimony and exhibits in the record. The alleged absence of certain words from the checks when they were issued was an issue of fact for the jury; it could hardly resolve that issue without seeing the checks. And it obviously could not see them until they were admitted in evidence.

In fact, upon appellant's own theory of the case, the checks were not only admissable in evidence but were indispensable to him. And the testimony as to the circumstances under which the name "West Coast Supply Co." appeared on these checks all went to the basic theories of both the appellant's and the Government's cases.

Plainly, appellant, an attorney, a former O. P. A. ration board member, concocted a scheme to evade the sugar rationing regulations and to obtain an unusually large amount of sugar without right to do so; his scheme backfired and he is now seeking to extricate himself by means of technical and specious arguments and contentions. This Court should not permit him that avenue of escape.

II.

Appellant in effect asserts (A. B. 17-27) that a certain conversation between appellant and Government investigator Loud should not have been admitted in evidence.

The testimony of that witness relating to a conversation was offered upon the element of wilfulness and disclosed that prior to July 1, 1946, appellant said that "he was going to get sugar one way or another"; that he was short of sugar; that "inasmuch as meat rationing and gasoline and processed foods had gone off and no accounting was ever made of the filling station people or the grocers or the butchers as to how many points they had left or if it equaled their inventory," that appellant felt the same thing would happen with reference to sugar, and he was going to get it one way or another.

Investigator Loud informed appellant during the conversation, which took place in February, 1946, that sugar rationing was not off, and that anything appellant did

contrary to the regulations would be illegal. Thereupon appellant replied that he was not going to be caught short, that he was going to build up his inventory in case sugar rationing went off, and he was going to be supplied with as much sugar as he could possibly get [R. 293].

As appellant, in part, correctly appraises this conversation, it "expressed a design or plan to obtain sugar" on the part of appellant (A. B. 21). It further constituted evidence material to the issue of wilfulness, we submit, and was properly admitted into the case by the trial court.

The state of mind of the appellant was in part revealed by this conversation and, considered in the light of subsequent events in which appellant participated, this conversation furnished proof which the jury could accept as indicating that prior to July 1, 1946, appellant had a preconceived method for obtaining sugar regardless of rationing restrictions and that he later did so despite the fact that he knew his acts were in violation of the law. And, as the District Court pointed out upon the argument in this connection, "any knowledge brought to the defendant with reference to the regulations, or anything that he said with reference to his attitude towards those regulations, is admissible" [R. 288-289].

Appellant's subsequent denial on the witness stand that such a conversation had taken place with Loud, presented an issue of credibility for the jury, resolution of which could properly affect not only the jury's beliefs and disbeliefs as to the occurrence of this particular incident, but could also form a basis for the jury's final conclusion as to the appellant's true purposes, motives and activities in this case, both as established by this resolution and inferrible from all of the evidence in the case. What the appellant is complaining of in this instance is actually, we submit,

not so much the propriety of the trial court's ruling in admitting this evidence, since the trial court had almost unlimited discretion on ruling on the admissibility of evidence, but merely the fact that appellant, having finally found that he out-smarted himself in all his activities and dealings, was not successful in causing the jury to believe his protestations of innocence. This court plainly should now offer no aid to appellant in his efforts to extricate himself from the effects of his wilful, illegal acts.

III.

Appellant argues (A. B. 28) that his motion for judgment of acquittal should have been granted for the reasoning that the balance in the sugar ration account of the West Coast Supply Company was in excess of the total poundage in ration credits withdrawn by the checks which constitute the basis for half of the counts (A. B. 28-32).

This contention is wholly without merit. Appellant simultaneously issued checks for a total of more than 1,300,000 pounds of sugar upon an account having a balance of less than 40,000 pounds. The check for 600,000 pounds (G. E. 6) was the first which was charged against the rationing account, thereby immediately creating an overdraft.

Appellant had no ration account under his own name, and the West Coast Supply Company's account, on which he was an authorized drawer, not only did not have any such balance as that drawn against it, but it is clear that appellant was under no misconception as to these facts; he knew them, but was out to obtain sugar in any way he could. That he succeeded in doing so in gross violation of the law, is clear.

Appellant persistently repeats (A. B. 30 ff) his baseless contention to the effect that his alleged omission of the words "West Coast Supply Company" from the ration checks places his acts in obtaining the 1,370,000 pounds of sugar beyond the pale of the law. This argument is so preposterous as to fall of its own weight.

It is clear that appellant, who had been dealing with the sugar suppliers as the direct representative of the West Coast Supply Company, and who bought the 1,370,000 pounds of sugar on July 1, 1946, in its name and for delivery to it, clearly intended to, and did succeed in carrying out the transaction, at least ostensibly, on behalf of that concern. And in issuing the ration checks he did so also in that guise. When the sugar arrived, appellant, under another of his fictitious-name identities, which he appears to have used at random as best fitted his scheme of the moment, received the sugar and paid for it.

It is plainly immaterial what name appellant appended to the ration and money checks, or what name he bore in performing each act. In every instance it was appellant who conceived the idea, projected it into action, and reaped the benefits of his own machinations. His gyrations should not permit him to avoid the inescapable fact that he bought and accepted the delivery of sugar when he had no right to it under the rationing laws and regulations, and that he illegally issued ration currency for a total of 1,370,000 pounds of sugar when the only account to which he had access contained a balance of less than 40,000 pounds.

## IV.

Appellant complains (A. B. 38 ff) that he was forced to produce his private papers. The complaint is baseless.

Appellant, an attorney, offered himself as a witness in his own defense. While testifying on direct examination, appellant testified as to his money payments for the 1,370,000 pounds of sugar [R. 354 ff]. He said the payments were made by the John H. Ziegler Company, by check [R. 354-355]. The Government's objection to testimony respecting the checks, on the ground that the payment check should be produced, was sustained after appellant had said that he made the payments [R. 354-355]. Appellant then offered to obtain the last check, because he could not answer his counsel's question as to its terms [R. 355], and offered it in evidence, and it was received [R. 355-356].

The identity of the purchaser of the sugar and of the person who accepted it was an issue in the case, as was the question of overdrawing upon the West Coast Supply Company's ration account.

On cross-examination appellant was questioned concerning the fact that the money check introduced by him in evidence showed on its face that it was in payment of a "West Coast Supply Co." transaction [R. 379]. He had testified that it was the John H. Ziegler Company which was manufacturing sugar products [R. 333, 335, 344].

Government counsel asked appellant [R. 381] whether the other three money checks used to pay for the sugar purchases were in the same form as that offered in evi-

dence by appellant. Appellant, an attorney, replied by stating that "the checks are here in court." [R. 381]. His attorney, however, then refused to produce the checks [R. 381-383]. Upon order of the Court, the checks were produced [R. 383].

The request for these checks in the light of all the facts in the case and appellant's testimony, was clearly proper, as was the court's ruling. Appellant had opened the entire subject by his defense theory and his testimony on his direct examination. Not only were the facts in issue as to which he had thus testified, but his overall credibility was subject to question.

Having offered himself as a witness, having first developed the subject of the cash payments for the sugar and the interrelation of the activities of the two companies, and having proffered the checks in the first instance, appellant should not now be heard to complain because the Court had the checks finally produced.

*United States v. Hoyt,* 53 F. (2d) 881;

*Bioldeau v. United States,* 14 F. (2d) 582, 273 U. S. 737;

*Garcia v. State,* 35 Ariz. 35, 274 Pac. 166.

V.

The so-called "expert" testimony of Schneider (A. B. 47 ff) had no place in the trial below. By offering this testimony, appellant was seeking to introduce matters foreign to the criminal prosecution, matters which could not possibly affect the outcome of the case since they were not relevant or material to the issues involved, as a reading of appellant's offer of proof in this respect will disclose [R. 409-411, 420-424]. The evidence was properly rejected by the trial court.

VI-XIII.

Eight specifications of error (A. B. 53-67) relate to some instructions given by the Court below, and others not given.

The law applicable to this case was fully and adequately stated by the trial court in its instructions to the jury [R. 617-639]. Those concerning which appellant complains as having been refused by the Court, were properly refused, and those given, were proper in every respect.

(1) Government's Instruction 8 (A. B. 53) correctly states the law. And appellant's objection to it on the ground that it "disregarded the major part of appellant's defense, namely, lack of intent," is baseless. Ignorance of the law is no excuse. And appellant was the expert on regulations pertaining to sugar at the concerns involved in this case; he was a former O. P. A. ration board officer, and is an attorney. Surely, at least in his latter capacity he must have known that ignorance of the law would not excuse him. Moreover, the record discloses a deliberate disregard of the law on his part, not ignorance of it. The instruction was proper.

(2) Defendant's Requested Instruction No. 16 (A. B. 54) constituted a further attempt by appellant to avoid the conviction by confusing the jury as to the true issues in the case. The requested instruction was unnecessary to a full statement of the applicable law on the evidence in the case. The effect of this instruction was to require the jury to bring in a verdict of not guilty.

(3) Defendant's Requested Instruction No. 22 (A. B. 56) does not correctly state the law. Sugar rationing was not continued by Executive Order 9745; it was always in effect under the Second War Powers Act which remained in existence at all times material in this case. The Executive Order merely continued the administrative functions of the O. P. A. in enforcing sugar rationing.

Moreover, publication of a law or regulation in the Federal Register creates notice by law, irrebuttable in that respect—and contrary to the terms of this proposed instruction.

Nor has this proposed instruction anything in it which might bear on the element of wilfulness. That was fully covered, moreover, by the court's instructions.

(4) Defendant's Requested Instructions Nos. 26, 35 and 36 [R. 60, 62, 63] do not correctly reflect the law. Their effect would have been to inject issues here not properly in the case, and to mislead the jury as to the requirements of the law.

(5) Defendant's Requested Instruction No. 37 (A. B. 64) confuses the issues, and the correct law in that respect was in fact given the jury by the trial court [R. 624].

(6) Defendant's Requested Instruction No. 39 (A. B. 67) was also properly rejected. This instruction is almost the same as Defendant's 22 (item 3 above), and it was improper for the same reasons.

## Conclusion.

No reversible error was committed by the trial judge. Appellant had a full and fair trial. The verdict is fully supported by the evidence. The sentence was moderate and clearly justified. The judgment should be affirmed.

Respectfully submitted,

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